KOH YAT CHONG & ANOR v. KOH CHIN LEAN PLANTATION SDN BHD & ORS

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: 22NCVC-63-06-2014]
21 JULY 2015

TRUSTS: *Trustee – Acting as trustee – Intention – Whether clearly stated that shares held on trust – Whether there was intention to create trust – Whether documents manifested intention to make gift – Whether could be construed as declaration of trust – Execution of transfer form in name of transferee – Whether created constructive trust pending registration into transferee's name – Whether transfer of shares to third and fourth defendants valid*

TRUSTS: *Constructive trust – Creation of – Allotment of shares – Whether clearly stated that shares held on trust – Whether there was intention to create trust – Whether documents manifested intention to make gift – Whether could be construed as declaration of trust – Execution of transfer form in name of transferee – Whether created constructive trust pending registration into transferee's name – Whether transfer of shares to third and fourth defendants valid*

The second defendant had four sons from his first marriage, including the two plaintiffs, whilst the third defendant was the son from his second marriage to the fourth defendant. At the second defendant's behest, the first defendant company was incorporated. One of the principal reasons for the incorporation of the company was to allot the shares of the company ('the said shares') equally between all of the second defendant's sons. Upon incorporation, 20% of the said shares were allotted to the second defendant's son one Koh Yek Joo and the remaining 80% to the second defendant. In 2009, another 20% of the said shares was allotted to another son one Koh Yik Kwai. At this juncture, the plaintiffs requested Koh Yek Joo to transfer the second defendant's 60% equity in the first defendant to the remaining sons. Koh Yek Joo refused. Thus, on 7 April 2010, a family meeting was held to resolve the dispute over the said shares. The parties reached an agreement on the distribution of the properties and assets of the second defendant and the terms were set out in a document. It provided, amongst others, that the said shares of the first defendant were to be distributed equally between his five sons and each was to receive 20% of the shares. Following the family meeting, five transfer forms and a director's circular resolution was prepared. The transfer forms were signed by both the plaintiffs as transferees and the second defendant as the transferor. Thereafter, the first plaintiff and the second defendant made a statutory declaration before a lawyer. In the statutory declaration, the second defendant affirmed that it was his intention that the shares in the first

A defendant were to be distributed equally between his five sons. However, the second defendant, subsequently, transferred the said shares to the third and fourth defendants. It was the plaintiffs' case that the agreement and statutory declaration signed by the second defendant manifested an intention to transfer the shares to them as a gift by a declaration of a trust. In the B alternative, it was alleged that a constructive trust came into existence when the second defendant executed the transfer forms with the intention of transferring the shares to them. Thereafter, the shares were held by him as a constructive trustee pending the registration of the shares in their names. The plaintiffs thus sought a declaration that they were the beneficial owners C of the said shares and that the transfer of the shares to the third and fourth defendants be cancelled and be transferred to them. The issue that arose for determination *inter alia* were (i) whether the documents signed by the second defendant manifested an intention to be a trustee for the plaintiffs; (ii) whether a constructive trust came into existence in favour of the plaintiff when the second defendant signed the share transfer forms; and (iii) whether D the transfer of the shares to the third and fourth defendants was valid.

Held (allowing plaintiffs' claim with costs):

(1) A trust could be established without the word 'trust' being used. For a person to declare himself trustee of property, he must clearly and E unambiguously show his intention that the property was henceforth to be held by him as trustee. If he had done so, the trust was complete and there was no need for any transfer to take place. There was no clear and compelling words that unequivocally manifest an intention by the second defendant to create an express trust over the said shares in the F plaintiff's favour. There was nothing in the documents nor the factual matrix that support an intention to create a trust. (paras 27 & 28)

(2) The second defendant was an elderly man and it was unlikely that he intended to retain his rights in the shares by holding them on trust and be subjected to onerous obligations. Further, in the statutory declaration G that the second defendant made before the lawyer, significantly, the second defendant did not describe himself as a trustee for the plaintiffs. (para 28)

(3) Evidence showed that the second defendant intended to give the shares to the plaintiffs as a gift by transferring it to them. When the documents H manifested an intention to make a gift, it should not be construed as a declaration of trust. Therefore, the submission that the documents demonstrated that a trust was established and that the second defendant held the shares as trustee for the plaintiffs was rejected. (para 29)

I **(4)** The second defendant executed the transfer forms in favour of the plaintiffs, but the transfer was not completed by registration of the plaintiffs as the new owners. According to the principles in *Milroy v. Lord*, where shares were gifted, there could be no complete gift of shares

as between transferor and transferee unless and until the transferee was placed on the register of members. However, *Re Rose, Rose v. IR* mitigated the harshness of *Milroy v. Lord* on incompletely constituted gifts. The second defendant being the legal owner of the shares until registration in the plaintiffs name held the legal interest in the shares as a constructive trustee for the plaintiffs. (paras 38, 42 & 43)

(5) The conscience of the third and fourth defendants were tainted with knowledge of the trust. Accordingly, the plaintiffs were entitled to enforce the trust against the third and fourth defendants. In any event, the third and fourth defendants were not entitled to the shares as they were not *bona fide* purchasers. (paras 46 & 47)

Case(s) referred to:

Cheu Kuok King v. Jurudaya Construction Sdn Bhd [2008] 1 LNS 445 CA ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***
Kaye and Others v. Zeital and Another [2010] EWCA Civ 159 ***(refd)***
Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock [2005] 3 CLJ 188 CA ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(refd)***
Milroy v. Lord (1862) 4 De GF & J 264 ***(refd)***
Pennington and Another v. Waine [2002] 4 All ER 215 ***(refd)***
Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750 ***(refd)*** *CA*
Re Rose, Rose v. IRC [1952] 1 All ER 1217 ***(refd)***
Richards v. Delbridge (1874) LR 18 Eq 11 ***(refd)***
See Hong Chen & Sons Sdn Bhd & Ors v. Datuk M Kayveas (Sebagai Pegawai Awam Parti Progresif Penduduk Malaysia Baru PPP) [2011] 1 LNS 1732 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Wan Naimah v. Wan Mohamad Nawawai [1972] 1 LNS 164 FC ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 162
Evidence Act 1950, s. 114(g)

Other source(s) referred to:

Maitland, *Lectures on Equity*, 1932, p 73

For the plaintiff - Rashpal Singh Khajan Singh; M/s Rashpal Singh & Co
For the 1st & 2nd defendants - Vivekanandan AMS Periasamy (Vivegarubani Kandaiah with him); M/s Selvam, Nanda & Partners
For the 2nd & 3rd defendant - Leong Cheok Keng; M/s Leong & Tan

Reported by Sandra Gabriel

A

JUDGMENT

SM Komathy JC:

[1] This is an action by the plaintiffs against their father, the second defendant, claiming 1,000,000 shares ('the shares') of the first defendant company. The plaintiffs claim that the second defendant held the shares in trust for them but in breach of that trust, the second defendant transferred the shares to the third and fourth defendants. The second defendant denied the existence of any trust and averred that the transfer of shares to the third and fourth defendants was valid.

The Trial

[2] During the trial over six days, the plaintiff called nine witnesses, whilst the defendant called five. There was no serious dispute on the facts, save and except on the questions of whether the second defendant had declared himself a trustee of the shares for the plaintiffs, and the intention of the second defendant in signing the forms to transfer his shares in the first defendant to the two plaintiffs.

[3] At the close of the plaintiffs' case, the second defendant submitted that there was no case to answer, whilst the other defendants called witnesses. The fourth defendant did not take the stand.

The Facts

[4] The undisputed evidence was that the second defendant had two wives, four sons from his first marriage, including the two plaintiffs, whilst the third defendant is the son from his second marriage to the fourth defendant.

[5] The second defendant had several assets, among others, 128 acres of oil palm land. At his behest, the first defendant company was incorporated sometime in 2004. He entrusted his son Koh Yek Joo, an accountant to attend to the incorporation. One of the principal reasons for the incorporation of the company, was to allot the shares of the company equally between all of his sons in the hope of resolving an on going conflict between them over the distribution of his properties.

[6] Upon incorporation, 20% of the shares were allotted to Koh Yek Joo and the remaining 80% to the second defendant. In view of his advanced age, the second defendant relied on Koh Yek Joo to manage the company and in 2009, another 20% was allotted to another son, Koh Yik Kwai.

[7] At this juncture, the plaintiffs approached Koh Yek Joo and requested him to transfer the second defendant's 60% equity in the first defendant to the remaining sons in accordance with their father's instructions. He refused. On 7 April 2010, a family meeting was held to resolve the dispute over the

shares. It was attended by the second defendant and his four sons from his first marriage and a close family friend, the late Goh Pok Seong ('Goh'). The parties reached an agreement ('agreement') on the distribution of the properties and assets of the second defendant, and the terms were set out in a document prepared by the first plaintiff in the Chinese language. It provided, amongst others, that the shares of the first defendant were to be distributed equally between his five sons and each was to receive 20% of the shares (500,000) in the company. The terms of the agreement were accepted and signed by all those present at the meeting including Koh Yik Kwai, Koh Yek Joo and the second defendant, the three directors of the first defendant.

[8] Goh swore a statutory declaration on the same day confirming his presence at the meeting held on 7 April 2010 and that the agreement prepared by the first plaintiff reflected the terms of the settlement which the parties had agreed to.

[9] Following the family meeting, the company secretary of the first defendant prepared five transfer forms and a director's circular resolution. The transfer forms were signed by both the plaintiffs as transferees and the second defendant as the transferor. On 20 January 2012, the first plaintiff accompanied the second defendant to see a lawyer to make a statutory declaration. In the statutory declaration, the second defendant affirmed that it was his intention that the shares in the first defendant were to be distributed equally between his five sons.

[10] In August 2013, the plaintiffs brought an action against the first and second defendants to claim their entitlement to the shares. When it emerged that the shares in question had been transferred to the third and fourth defendants, it was withdrawn with liberty. The present action was then instituted by including the third and fourth defendants as co defendants.

Case For The Plaintiffs

[11] It was the plaintiffs' case that the agreement and statutory declaration signed by the second defendant manifested an intention to transfer the shares to them as a gift by a declaration of a trust. In the alternative, it was alleged that a constructive trust came into existence when the second defendant executed the transfer forms with the intention of transferring the shares to them. Thereafter, the shares were held by him as a constructive trustee pending the registration of the shares in their names. The plaintiffs thus sought a declaration that they were the beneficial owners of the shares and that the transfer of the shares to the third and fourth defendants be cancelled and be transferred to them.

Case For The Defendants

[12] On the other hand, the defendants denied the existence of a trust and contended that at best, the factual matrix of the case showed there was an incompletely constituted gift. The legal title to a share in a limited company,

which has a share register, may only be transferred to another person by registration of that share in a prescribed form. The gift of the legal interest in a share is not completed until registration has taken place. The defendants sought for the plaintiffs' case to be dismissed as the court will not enforce an incompletely constituted gift. The defendants also denied that the transfer forms signed by the second defendant were sufficient and operated to transfer beneficial interest in the shares to the plaintiffs.

The Issues

[13] There are essentially three issues which arise for determination, *to wit*:

(a) Whether the documents signed by the second defendant manifested an intention to be a trustee for the plaintiffs of the shares;

(b) If not, whether a constructive trust came into existence in favour of the plaintiff when the second defendant signed the share transfer forms;

(c) Is the transfer of the shares to the third and fourth defendants valid.

The Applicable Principles

[14] The classic statement of the law on this subject is found in the judgment of *Turner LJ in Milroy v. Lord* (1862) 4 De GF & J 264 at 274:

> I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

[15] In *Richards v. Delbridge* (1874) LR 18 Eq 11, Jessel MR said that a person may transfer his property without valuable consideration in one of two ways, by a declaration of trust or an intermediate gift. Jessel MR explained:

> The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount is law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning ...
>
> The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

[16] The statement of principle laid down in *Milroy v. Lord* and *Richards v. Delbridge* has been approved and applied in numerous local cases including *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614, *Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock* [2005] 3 CLJ 188; [2005] 4 MLJ 493 and *See Hong Chen & Sons Sdn Bhd & Ors v. Datuk M Kayveas (Sebagai Pegawai Awam Parti Progresif Penduduk Malaysia Baru PPP)* [2011] 1 LNS 1732; [2012] 2 MLJ 460.

[17] The authorities illustrate that a perfect gift can only be made in one of two ways:

(a) by a transfer of the gifted asset to the donee, accompanied by an intention in the donor to make a gift; or

(b) by the donor declaring himself to be a trustee of the gifted property for the donee.

[18] In case (a), the donor is required to do everything necessary to be done which is within his own power to do in order to transfer the gifted asset to the donee as he retains the right to countermand the gift before it is perfected. Where the donor has not done so, the gift is incomplete and the donee has no equity to perfect an imperfect gift: The court will not give a benevolent construction so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee. Thus, where a party intends to make a gift, the court should not hold that there is a trust. As Maitland said in a passage from his *Lectures on Equity* (1932) at p. 73:

> I have a son called Thomas. I write a letter to him saying "I give you my Blackacre estate, my leasehold house in the High Street, the sum of £1000 Consols standing in my name, the wine in my cellar." This is ineffectual - I have given nothing - a letter will not convey freehold or leasehold land, it will not transfer Government stock, it will not pass the ownership in goods. Even if, instead of writing a letter, I had executed a deed of covenant - saying not I do convey Blackacre, I do assign the leasehold house and the wine, but I covenant to convey and assign - even this would not have been a perfect gift. It would be an imperfect gift, and being an imperfect gift the Court will not regard it as a declaration of trust. I have made quite clear that I do not intend to make myself a trustee, I meant to give. The two intentions are very different - the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but to come under an onerous obligation. The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust. This is well illustrated by the cases of *Richards v. Delbridge*, L.R. 18 Eq. 11 and *Heartley v. Nicholson*, L.R. 19 Eq. 233.

[19] In case (b), once a trust relationship is established between trustee and beneficiary, the trustee is bound by the trust and must give effect to it by transferring the trust property into the name of the beneficiary. The fact that a beneficiary has given no value or consideration is irrelevant. It is a completely constituted trust and is effective since the donor has constituted himself a trustee for the donee who can as a matter of trust law enforce that trust. A trust which has not been perfectly created cannot operate as a trust. It will only be enforceable as a contract to create a trust and to be enforceable, it requires consideration from the beneficiaries. See *Cheu Kuok King v. Jurudaya Construction Sdn Bhd* [2008] 1 LNS 445; [2007] 4 MLJ 720.

[20] In his book *Trusts for Accountants*, Mark Ockelton MA states how a trust can be created:

> So, using the trust concept, if S wants B to have the benefit of certain property, S must carry out one of five courses of action.
>
> (i) He may transfer the property to B; this is a complete gift, without the imposition of a trust.
>
> (ii) He may declare himself a trustee of the property for B. This is a completely constituted trust. The property is in the hands of the trustee (S) and B has equitable ownership.
>
> (iii) He may transfer the property to T to hold on trust for B. This too is a completely constituted trust. The property is in the hands of the trustee (T) and B has equitable ownership.
>
> (iv) He may make a contract with B, for which B provides consideration, under which he promises to transfer the property to B. This is an incomplete transfer but B, having given consideration, can sue on the contract.

(v) He may make a contract with B, for which B provides consideration, under which he promises to transfer the property to T on trust for B. This is an incompletely constituted trust, but B, having given consideration, can sue on the contract.

[21] In *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674; [2005] 2 MLJ 422, the Court of Appeal held that the three essentials of a valid trust are:

(i) Certainty of words or Intention;

(ii) Certainty of subject matter; and

(iii) Certainty of object.

[22] It is with these principles in mind that I propose to consider the submissions pertaining to the first issue.

Issue 1 : Whether The Documents Signed By The Second Defendant Manifested An Intention To Be A Trustee For The Plaintiffs Of The Shares

[23] On the facts, counsel for the plaintiffs argued that all three 'certainties' were present to create a valid trust. The defendant disputed that there was certainty of intention to create a trust.

[24] The parties were poles apart on this question. The defendants contended that the absence of the word 'trust' or like words, appearing on the documents, negated the existence of any trust as alleged by the plaintiffs. In response, counsel for the plaintiff contended that there was no such requirement and what was required was whether there was an intention, promise or representation made to give the other a certain right or property.

[25] In *Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41, Suffian CJ dealt with the question of whether the term trust must be used to create a trust. This is what he said:

> The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly M.R. in *Grant v. Grant* 55 ER 776, words declaring a trust:
>
> > need not be in writing ... They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, "I hold the property in trust for you," nor is it necessary to say, "I hold the same for your separate use." Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created. (Page 777)

[26] The principle enunciated in *Wan Naimah* that an intention to create a trust must be expressed in clear and unequivocal language was reiterated by the Court of Appeal in *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750; [2006] 1 MLJ 97. In *Perman Sdn Bhd*, it was held that a heavy onus lies on a party asserting the existence of a trust based on the rule of justice that no person's property should be burdened with the interest of another in the absence of the clearest proof.

[27] In light of the foregoing, it is clear that a trust can be established without the word 'trust' being used and the crucial question that needs to be addressed is whether in substance a sufficient intention to create a trust has been demonstrated. For a person to declare himself trustee of property, he must clearly and unambiguously show his intention that the property is henceforth to be held by him as trustee. If he has done so, the trust is complete and there is no need for any transfer to take place.

[28] Having closely perused the documents relied upon by the plaintiffs, I find no clear and compelling words that unequivocally manifest an intention by the second defendant to create an express trust over the shares in the plaintiffs favour. I find nothing in these documents nor the factual matrix that support an intention to create a trust. It is important to note that the second defendant was an elderly man and it is unlikely that he intended to retain his rights in the shares by holding them on trust and be subjected to onerous obligations. There is another indication that the second defendant was not intending to create a trust. In the statutory declaration that he made two years later before the lawyer, significantly, he did not describe himself as a trustee for the plaintiffs.

[29] To my mind, the evidence shows that the second defendant intended to give the shares to the plaintiffs as a gift by transferring it to them. I agree with the defendants that when the documents manifested an intention to make a gift, it should not be construed as a declaration of trust. I therefore reject the submission that the documents demonstrated that a trust was established and that the second defendant held the shares as trustee for the plaintiffs.

[30] There is one other point I must deal with for the sake of completeness. It was contended by the plaintiffs that their pleading contained an express averment that the second defendant will support their case if he was not prevented by his co defendants from testifying in court. The absence of the second defendant at the trial to refute the allegation of trust, it was argued, called for the invocation of the adverse inference in s. 114(g) of the Evidence Act 1950, that if called, he would have corroborated the plaintiffs claim.

[31] In responding to this argument, the defendants argued that the plaintiffs ought to have called the second defendant if it was their case that he would corroborate their claim. My attention was drawn to the decision

of the Supreme Court in *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371, as authority for the proposition that a plaintiff can call on the defendant to corroborate his claim. In that case, counsel for the second appellant indicated to the court that the second appellant would not give any evidence but wished to rely solely on the submission that the plaintiff had not made out a case. Thereupon, the respondent applied to call the second appellant as witness for the plaintiff. The application was allowed by the trial judge. In dealing with the procedure adopted at the trial, it was observed:

> The cases cited on the calling of the opposite party as witness were ordinary civil cases - *Price v. Manning* (1889) 42 Ch 372 and *Barker v. Furlong* [1891] 2 Ch 172, the standard of proof required being proof on the balance of probability.
>
> There is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter should be left to the discretion of the trial judge according to the circumstances of the case.
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> As a matter of practice, this is of course seldom done for the simple reason that when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence the plaintiff runs a risk every time he elects to take such a course of action.

[32] I do not accept the argument advanced by the plaintiffs that the failure of the second defendant to testify called for the invocation of an adverse inference. In my judgment, this argument would have availed the plaintiffs had there been evidence to demonstrate an intention to create a trust and it was not part of the plaintiffs pleaded case that the second defendant would corroborate their version of the facts. In view of the averment in the statement of claim, the onus of calling the second defendant fell on the plaintiff as it became part of the plaintiff's pleaded case.

Issue 2: Whether The Second Defendant Became A Constructive Trustee Of The Shares Upon Executing Transfer Forms

[33] On the alternative claim of the plaintiffs based on constructive trust. The plaintiffs relied on the following facts to show that a constructive trust existed. Their father promised to give them the shares and signed the transfer forms following the agreement reached at the family meeting on 7 April 2010. After the transfer forms were signed, on the instructions of the second defendant, he handed the undated and uncompleted transfer forms to Koh Yek Joo for the company to attend to the remaining formalities and proceed with the registration of the shares in their names. However, the company took no action to register the shares in their names.

[34] The plaintiffs contended that having signed the transfer forms, the second defendant had done all in his power to divest himself of the shares and to vest them in the plaintiffs as transferees, and the transfers were

effective as between him and them to divest the second defendant of beneficial ownership and to constitute the plaintiffs/transferees the beneficial owners of the shares. The constructive trust came into existence when the shares were wrongfully transferred to the third and fourth defendants.

[35] On the other hand, the defendants contended that the contention of the plaintiffs on the existence of a constructive trust was unsupported by authority. It was said that the plaintiffs had attempted to convert a case of an imperfect gift unsupported by consideration into a constructive trust which was non existent. In any event, the plaintiffs case did not fall within the parameters of a constructive trust as it was imposed only in certain circumstances.

[36] In assessing the rival contention of the parties, it would be useful to refer to case law on the meaning of the term constructive trust. In *Perman Sdn Bhd & Ors v. European Commodities Sdn BHd & Anor (supra)* the term was lucidly explained and illustrated in the judgment of Gopal Sri Ram JCA:

> By contrast, a constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties. A true constructive trust exists only in a limited number of cases. It is not relevant for present purposes to list all of them here. Suffice if I give two fairly obvious examples. The first is where there is a valid and binding contract for the sale of land in which case equity imposes a constructive trust upon the vendor (see *Wong Siew Choong Sdn Bhd v Anvest Corp Sdn Bhd* [2002] 1 MLJ 143 per Abdul Kadir Sulaiman JCA). The second is where there is a failure of formalities to create a trust and the party asserting absolute title against the beneficial owner is using statute as an engine of fraud. See, *Bannister v Bannister* [1948] 2 All ER 133; *Hon Kon Kim v Betsy Lim Gek Kim* [2001] 4 SLR 340. The hallmark of a genuine constructive trust is that the constructive trustee has title to the property that is the subject matter of the litigation or claims the right to deal with that property on behalf of the beneficial owner.

[37] In *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64, the Federal Court elucidated:

> From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.

[38] In the present case, the second defendant executed the transfer forms in favour of the plaintiffs, but the transfer was not completed by registration of the plaintiffs as the new owners. Instead, the shares were subsequently transferred to the third and fourth defendants. If the defendants are correct in the submissions they make based on the principles in *Milroy v. Lord* that where shares are gifted, there can be no complete gift of shares as between transferor and transferee unless and until the transferee is placed on the register of members, the plaintiffs claim must fail.

[39] The question arises, can there be a completed gift of shares by transfer even before the transfer is registered. There are three authorities that are of assistance on the point. In *Re Rose, Rose v. IRC* [1952] 1 All ER 1217 the English Court of Appeal dealt with the rights of a transferee to whom a gift of shares is made by the transferor by the execution of a transfer form. There the deceased had executed instruments of transfer and delivered them with the relevant certificates to the transferees. The Court of Appeal held that the beneficial interest in the shares passed when the share transfers were delivered to the transferee, and that consequently the transferor was a trustee of the legal estate in the shares from that date. Jenkins LJ said at 1228:

> In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the share, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and transferee, and making the transferee the beneficial owner.
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> No person can exercise his rights as a shareholder *vis-a-vis* the company, or be recognised by the company as a member, unless and until he is placed on the register of members. But, in my view, it is a fallacy from that to adduce the conclusion that there can be no complete gift of shares as between transferor and transferee unless and until the transferee is placed on the register. In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner.

[40] The next case is *In Pennington and another v. Waine and others* [2002] 4 All ER 215, the deceased informed a partner (P) in the company's auditors, that she wished to transfer a portion of her shares to her nephew H. P prepared a share transfer form, and the deceased signed it and returned it to P. It was placed on the company's file. The deceased informed H that she wanted to give him some of her shares, and instructed P to arrange the transfer to H of 400 shares in the company. However, she died before the shares could be registered in H's name. The trial judge held the shares belonged to the estate of the deceased. On appeal, it was argued that the deceased had intended an immediate gift and had not constituted herself as trustee of the shares, but that the gift was incomplete, since the subject matter of the gift had neither been delivered to the company nor to H. The Court of Appeal rejected this argument and explained:

> Where a transaction was purely voluntary, the principle that equity would not assist a volunteer had to be applied and respected. Accordingly the gift had to be perfected or completely constituted. An incompletely constituted gift of shares could, however, be upheld if the gift had been completed to such an extent that the donee could enforce his right to the shares as against third parties without forcing the donor to take any further step. It was not necessary that the donor should have done all that was necessary to be done to complete the gift, short of registration of the transfer. On the contrary, it was sufficient if the donor had done all that it was necessary for him or her to do. Moreover, it was not always necessary that there should have been delivery of the shares: in some circumstances, delivery could be dispensed with. In the instant case there was a clear finding that the deceased had intended to make an immediate gift. H had been informed of it, and after a certain stage it would have been unconscionable for the deceased to have recalled the gift. It followed that it would also have been unconscionable for her personal representatives to refuse to hand over the share transfer to H after her death. In those circumstances, delivery of the share transfer before the death of the deceased was unnecessary as far as perfection of the gift was concerned. Furthermore, the letter from P to H stating that he needed to take no further action could, on the principle of benevolent construction, be construed as meaning that the deceased and, through her, P had become agents for H for the purpose of submitting the share transfer to the company. Accordingly, the judge had reached the correct conclusion.
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> ...
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> Secondly equity has tempered the wind (of the principle that equity will not assist a volunteer) to the shorn lamb (the donee) by utilising the constructive trust. This does not constitute a declaration of trust and thus does not fall foul of the principle (see *Milroy v. Lord* and *Jones v. Lock*, above) that an imperfectly constituted gift is not saved by being treated as a declaration of trust. Thus, for example, in the Choitram case the Privy

Council held that the assets which the donor gave to the foundation of which he was one of the trustees were held upon trust to vest the same in all the trustees of the foundation on the terms of the trusts of the foundation. This particular trust obligation was not a term of the express trust constituting the foundation but a constructive trust adjunct to it. So, too, in *Re Rose, Rose v IRC* the Court of Appeal held that the beneficial interest in the shares passed when the share transfers were delivered to the transferee, and that consequently the transferor was a trustee of the legal estate in the shares from that date.

[41] In *Kaye and others v. Zeital and another* [2010] EWCA Civ 159, the Court of Appeal found that the deceased, who had died intestate, had not fulfilled the formalities required for a transfer of a share, and therefore his purported transferring of a share in his company to his partner resulted in the gift failing as an imperfect one. The deceased had signed an undated blank stock transfer form in relation to the share he held, leaving blank the transferee boxes.

[42] The three decisions indicate the approaches the English Courts have taken to perfecting imperfect gifts, moving away from its orthodox position laid down in *Milroy v. Lord* to the current liberal position. These decisions indicate that equity will assist a beneficiary who has given no consideration if the donor has done everything in his power to transfer title, and in doing so, give effect rather than frustrate the donor's clear intention. *Re Rose* has mitigated the harshness of *Milroy v. Lord* on incompletely constituted gifts.

[43] Applying the approach elucidated in the three English cases, in my judgment, a constructive trust came into existence upon the execution of the transfer form either by itself or coupled with delivery of the transfer form by the second defendant to the plaintiffs to apply for and obtain registration. The second defendant being the legal owner of the shares until registration in the plaintiffs name held the legal interest in the shares as a constructive trustee for the plaintiffs.

[44] Accordingly, as the share transfer has been executed by the second defendant and was duly presented to the company for registration, the plaintiffs would have been entitled, if necessary, to apply to the court for an order for rectification of the share register under s. 162 of the Companies Act. Such an order would not, of course, be granted if for example the directors had a discretion to refuse to register the transfer and had timeously passed a valid resolution to decline to register the transfer. There is no evidence such a resolution was passed.

[45] In these circumstances, I am unable to agree with the defendants that the facts of this case do not fall within the parameters of a constructive trust.

A **Issue 3: Whether The Transfer Of The Shares To The Third And Fourth Defendants Is Valid**

[46] All that remains to be decided is whether the transfer of the shares to the third and fourth defendants is valid. The transfer of the shares to the third and fourth defendants was approved by the first defendant's board on 28 June
B 2013. It was the plaintiffs case that the transfer of the shares to third and fourth defendants was wrongful as the defendants ought to have known of the want of authority on the second defendant's part to transfer the shares in light of the family agreement reached on 19 August 2009. It is crystal clear that the conscience of the third and fourth defendants were tainted with
C knowledge of the trust. Accordingly, the plaintiffs are entitled to enforce the trust against the third and fourth defendants.

[47] In any event, the third and fourth defendants were not entitled to the shares as they are not *bona fide* purchasers. In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751:

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> As earlier observed, we are of the view that the appellant at all material times was entitled to a half share in the trust property as a beneficiary under a constructive trust. She was entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. But equity will not assist the victim of a breach
> E of trust to trace trust property where it will be inequitable to do so, for example because the property to be traced has gone into the hands of a *bona fide* acquirer for value or because it has gone into the general funds of a charity (see *Re Diplock's Estate* [1948] 2 All ER 429).
>
> ... whether the trust in the appellant's favour may be enforced against the
> F second respondent. We are of the view that it may. There are two reasons. In the first place, as the trial judge correctly held, the second respondent was not a *bona fide* purchaser for value. He found that the second respondent company was in substance the alter ego of the first respondent's common law husband with whom she undoubtedly cohabited. He held, and held correctly, that the knowledge of the first
> G respondent was to be attributed to the husband and thence to the second respondent company. In our judgment, the approach adopted by the trial judge is correct both on principle and authority. As for principle, the starting point is no doubt the doctrine of corporate personality.

Conclusion

H **[48]** For the reasons stated, I allow the plaintiffs claim and make the following orders:

(i) It is declared that the first plaintiff is the beneficial owner of 250,000 shares in the first defendant.

I (ii) It is declared that the second plaintiff is the beneficial owner of 250,000 shares in the first defendant.

(iii) It is ordered that the third defendants retransfer 250,000 shares to the first plaintiff

(iv) It is ordered that the fourth defendants retransfer 250,000 shares to the second plaintiff.

(v) In the event, the third and fourth defendants refuse to execute the share transfer forms within one month of this order, the Senior Registrar of the High Court in Ipoh is authorised to execute the transfer the same on their behalf.

(vi) The defendants pay the plaintiffs costs of RM40,000.